LIBRARY
SUPREME COURT U. S.

Supreme Court, U.S.
FILED
JAN 8 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 893

PUBLIC SERVICE COMMISSION OF THE STATE OF WISCONSIN,

and

CITY OF CHICAGO, A MUNICIPAL CORPORATION OF THE STATE OF ILLINOIS,

Joint Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit.

BRIEF OF RESPONDENT NATURAL GAS PIPELINE COMPANY OF AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CHARLES C. McDUGALD
WILLIAM W. BRACKETT
PAUL E. GOLDSTEIN
DONALD W. GLAVES
RAYMOND J. PETERSEN
ROBERT W. BARTLETT
ROSS, HARDIES, O'KEEFE, BABCOCK, McDUGALD & PARSONS
122 South Michigan Avenue
Chicago, Illinois 60603
Attorneys for Respondent
Natural Gas Pipeline Company
of America

MIDWEST LAW PRINTING CO., 325 N. MICHIGAN, CHICAGO 60601, FINANCIAL 6-2626

INDEX

	PAGE
Opinion Below	2
Question Presented	2
Statement of the Case	3
Argument—Reasons for Denying the Writ	5
Summary	5
I. The issue raised by Joint Petitioners has no significance beyond this case	5
II. Use of the 1961 date proposed by Petitioners would be even more unjust than the 1964 date used by the Commission	6
III. Neither the settlement agreement nor the Natural Gas Act require the Commission to use the retroactive 1961 date as to Natural	8
A. The settlement agreement did not fix an applicability date, and left the Commission free to order an appropriate date	8
B. The Natural Gas Act does not require application of a new policy retroactively	13
Conclusion	16

CITATIONS

Cases:

Alabama-Tennessee Natural Gas Co., 31 FPC 208, affirmed 359 F.2d 318 (5th Cir. 1966), cert. denied 385 U.S. 847 (1966) 3, 7, 15

Public Service Commission of New York v. *F.P.C.*, 329 F.2d 242 (D.C. Cir. 1964), cert. denied, sub nom. *Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963 (1964) 15

State Corporation Commission of Kansas v. *F.P.C.*, 215 F.2d 176 (8th Cir. 1954) 15

United Gas Improvement Co. v. *Callery Properties, Inc.*, 382 U.S. 223 (1965) 15

United Gas Pipeline Co. v. *Mobile Gas Corp.*, 350 U.S. 332 (1956) 14, 15

Wisconsin v. *F.P.C.*, 303 F.2d 380 (D.C. Cir. 1961), affirmed 373 U.S. 294 (1963) 15

Statutes:

Natural Gas Act, as amended, Section 4(e), 15 U.S.C. 717c(e) 5, 8, 13, 14, 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 893

PUBLIC SERVICE COMMISSION OF THE STATE OF WISCONSIN,

and

CITY OF CHICAGO, A MUNICIPAL CORPORATION OF THE STATE OF ILLINOIS,

Joint Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit.

BRIEF OF RESPONDENT NATURAL GAS PIPELINE COMPANY OF AMERICA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Natural Gas Pipeline Company of America (Natural) respectfully requests that this Court deny the Petition for Writ of Certiorari (Petition) filed herein by joint petitioners, for the reasons set forth herein below.

OPINION BELOW.

The basic proceeding below was a rate case before the Federal Power Commission (Commission) involving the rates of Natural. Natural and the joint petitioners each appealed the decision of the Commission, on separate grounds. Those appeals were heard by the United States Court of Appeals for the District of Columbia Circuit, Natural's appeal as Case No. 19836 and that of the joint petitioners as No. 19604. The cases were heard together and a joint opinion issued. Joint petitioners here appeal from No. 19604, in which Natural was an intervenor.

Case names, opinion numbers and dates are stated in the Petition.

QUESTION PRESENTED.

Did the Court of Appeals err in affirming the Commission's decision to require Natural to begin to use the "flow through" rate policy as of February 3, 1964, rather than as of March 1, 1961, as urged by joint petitioners? (Joint petitioners raise no question relative to the validity or propriety of use of such rate policy.)

STATEMENT OF THE CASE.

In a general rate case before the Federal Power Commission, to determine new levels of rates for the sale of natural gas by Natural, a settlement of all but a few issues was effected in 1962, with such issues left for later hearings and decision by the Commission. One of such issues related to the rate treatment of the effects upon federal income taxes of use of liberalized tax depreciation. On February 3, 1964, the Commission issued Opinion No. 417, *Alabama-Tennessee Natural Gas Company*, 31 FPC 208, affirmed 359 F.2d 318 (5th Cir.), cert. denied 385 U.S. 847 (1966), reversing its long standing policy and holding, inter alia, that the "flow through" rate policy, relative to tax use of liberalized depreciation, would be applied to Alabama-Tennessee prospectively from the date of such decision, but that the reserve accumulated by such company in accord with its long-standing practice of "normalizing" such tax expense should be retained by the company (but eliminated from its rate base). The Commission further stated that unless great differences in circumstances could be shown, such changed policy would be applied to all other natural gas pipeline companies.

In May of 1964, the Commission ordered that briefs be filed in Natural's case on the same reserved "liberalized depreciation" issue. After briefs and oral argument, the Commission held, by Opinion No. 456 issued March 18, 1965, that Natural's rates must reflect the "flow through" policy, effective as of February 3, 1964, the date upon which the Commission first adopted the "flow through" policy, in *Alabama-Tennessee*. (The other basic holding

of said opinion—the decision to apply "flow through" to Natural—has not been questioned by the Petition herein.)

On review, the United States Court of Appeals for the District of Columbia, inter alia, upheld the application of the *Alabama-Tennessee* 1964 date to Natural, but evinced "uneasiness"—not over rejection of joint petitioners' proposed 1961 date, but rather because, as Natural showed in its appeal, the Commission uniformly, except as to Natural, applied the "flow through" principle prospectively. But as to Natural, the policy was applied retroactively—by *1965* decision to the early *1964* effective date, thus requiring millions of dollars of extra refunds—even though the Commission's decision in favor of "flow through" was a complete reversal of pre-existing commission policy and decisions. Joint petitioners now seek to have this Court require the Commission to make that decision even more retroactive—by requiring refund of moneys collected back to 1961.

ARGUMENT—REASONS FOR DENYING THE WRIT.

Summary.

In summary, as discussed more fully hereinbelow, the Petition should be denied because:

1. The issue involved is of specific, not general, applicability, since it relates to only one company and the interpretation of a single, unique settlement agreement, in reference to choice of a "one-time" date.

2. The joint petitioners seek to require that the Commission be forced to make its decision against Natural become even more discriminatory than it now is, by requiring that the complete change of policy be applied to Natural over four years before that policy was found applicable to Natural. The Commission and the Court of Appeals were clearly correct in rejecting that position.

3. The Commission and the Court of Appeals were correct, as a matter of law, in holding, contrary to the claims of joint petitioners, that the settlement agreement between the parties in this case did not specify the effective date for application of any rate policy change to Natural, and that the Natural Gas Act allows the Commission discretion to avoid discrimination by making its rate case rulings effective as of a date on, *or after,* the rates involved in a rate increase case become effective.

I. The Issue Raised By Joint Petitioners Has No Significance Beyond This Case.

The basic claim of joint petitioners relates to interpretation of the terms of the settlement agreement between

the parties to Natural's rate case. It is a specific, unique document, with no general applicability. There are no standard terms in question, so that the interpretation problem has no relevance beyond this case.

The portion of the Petition which attempts to show "national importance and significance" (Section C, pages 15-16) discusses only the importance of rate case settlements, which is correct, but then jumps to the conclusion that "This administrative tool will become untenable, if not completely avoided should this decision be allowed to stand." This is an extreme and invalid conclusion, even if joint petitioners were correct in their basic position. But what is important is that their extreme conclusion could *only* be accurate by presuming the validity of the conclusion which joint petitioners are trying to prove—that the interpretation made by the Commission and the Court of Appeals, of the specific settlement agreement involved, relative to the effective date for application of the flow through policy, was clearly unreasonable and incorrect. As will be demonstrated later in this brief, joint petitioners have not shown this.

At this point, however, it is more relevant to reiterate that no topic or issue of broad significance or applicability is involved, and no injustice to the joint petitioners has been done.

II. Use Of The 1961 Date Proposed By Petitioners Would Be Even More Unjust Than The 1964 Date Used By The Commission.

As discussed earlier, the Commission refused to adopt the "flow through" policy for over ten years prior to its complete reversal of position, on February 3, 1964, in

Alabama Tennessee. The issue was reserved in Natural's rate case only because of the insistence of a petitioner, but there was no indication then that the Commission had any thought of change. Now, petitioners seek to *force* the Commission to make that reversal of policy retroactive, to March 1, 1961, almost three years *prior* to the time the Commission adopted the policy.

Further, such action would be wholly different than that taken by the Commission with regard to every other company in the industry. Specifically, the Commission has not applied the flow through policy to any company *prior* to the time it has found, in an Order *applicable to that company,* that flow through should be applied to that company. It has not, that is, except as to Natural. Whereas flow through has been applied to most companies as of dates *after* the policy was held applicable to those companies, in the case of Natural the Commission found flow through applicable in a decision regarding Natural which was issued March 18, 1965, but made the policy effective as of February 3, 1964, some thirteen months earlier. As to *no other* company has the Commission made a retroactive application.(*)

Even in the face of this discrimination against Natural, however, joint petitioners are here seeking to have this Court require the Commission to be even more discriminatory—to make its application of flow through to Natural

---

(*) The Court of Appeals expressed "uneasiness" over Natural's "thorny contention" relative to this discrimination, but concluded that the "various Commission's actions" relative to the effective dates as to various companies "have been, *so to speak,* reconciled." (emphasis added) (Petition, pages 42, 44 and 45) A 1961 date as to Natural could not be "reconciled", even on a "so to speak" basis.

almost three years more retroactive, to a 1961 date which not only far precedes the finding that flow through should be applied to Natural, but which also far precedes the *first* Commission adoption of the flow through policy as to *any* company.

The inequity of joint petitioners' claims are obvious.

III. Neither The Settlement Agreement Nor The Natural Gas Act Require The Commission To Use The Retroactive 1961 Date As To Natural.

A. The Settlement Agreement Did Not Fix An Applicability Date, And Left The Commission Free To Order An Appropriate Date.

Joint petitioners have taken on the extreme burden of trying to prove that the Commission is *required,* by the terms of the Settlement Agreement, to use the retroactive March 1, 1961 date. To attempt to justify this contention, joint petitioners set forth, at the bottom of page 12 of their Petition, a passage from the Settlement Agreement. However, only a part of the passage is quoted. The *entire* relevant passage reads:

> In the event it shall be determined in these proceedings by a valid and final order of the Commission that Natural in computing its cost of service in these proceedings, must utilize the above mentioned "flow through" method of tax computation, Natural, subject to its right to seek judicial review thereof, shall make *such further refunds,* with interest at 7% per annum from the 20th day of each month in which each excess payment was collected, to the date Natural refunds such excess payments, *as shall result from the reduction,* if any, in the level of any of the rates contained in its FPC Rate Schedules *that may be required by the Commission at the time of such order*; . . . (emphasis added) (Petition, page 67)

Thus, contrary to the misleading impression conveyed by the partial quotation in the body of joint petitioners' Petition, it is clear that the quoted passage of the settlement agreement provides that Natural shall make refunds consisting of whatever amounts *the Commission validly holds* to be an "excess payment" collected (in this case, the Commission held that such amount was the difference between rate levels under "normalization" and under "flow through", *for the period February 3, 1964 forward*). Assuming, *arguendo,* that "flow through" is a valid policy and that the Commission can make its order retroactive at all, the point here is that the *Settlement Agreement* left it for the Commission to decide whether to go back to March 1, 1961. It did not *require any* retroactivity, much less back to 1961.

The above Settlement Agreement language refers to Natural making "such further refunds * * * as shall result from the reduction, *if any,* in the level of any of the rates * * *," and the here emphasized "if any" language shows clearly that the possibility of *no* refunds (and/or no rate reductions)—which would mean no retroactivity—was left open; but in the face of this, joint petitioners claim that extreme retroactivity is required.

It is also significant that the *Settlement Agreement* language speaks of Natural being required to make "any refunds and/or rate reductions" by a particular distribution method and of Natural's obligations to make "such further refunds," with interest, "as shall result from the reduction, *if any*" in Natural's rates "that may be required by the Commission at the time of such order" requiring "flow through". The significance of the rate reduction-refund language, of course, is that if "flow

through" were ordered to be effective only prospectively from or after the date of the Commission's order, then only a reduction in Natural's rates would be ordered. On the other hand, if the order were made retroactive, as the Commission has attempted to do, then refunds, too, would be ordered. The language of the Settlement Agreement shows that *both* possibilities were contemplated, so that the Commission was left free, *by the Settlement Agreement,* to choose either a prospective or retroactive date.(*)

Further, the fact that the language of the Settlement Agreement provides that the "refunds," and the "reduction" in the "level of rates," which may be made if "flow through" was ordered and upheld, were to be those "that *may* be required by the Commission at the time of such order" shows, again, that Commission discretion is provided for. And this is consistent with the fact that the "question of whether Natural, in computing its cost of service for rate purposes," should use "normalization" or "flow through" was left for "adjudication by the Commission in these proceedings." (First sentence, Section IV (2), Settlement Agreement; Petition, page 66). An *adjudication* posits that all facets of the issue are to be decided—not, as petitioners claim, that the important issue of the length of the period for calculation of re-

(*) The Petition also refers to a letter from Natural's counsel (Petition, page 11). That letter, too, expresses the understanding of all parties that refunds (retroactive application) are a *possibility* under the Settlement Agreement, if the Commission did, and could, so order (Petition, page 55). But that is far different from saying, as do Petitioners, that the Commission *must* order refunds, particularly back to 1961. (See the Commission holding on this point, Petition, pages 72-73.)

funds, "if any," was predetermined, even though *all other* aspects of the issue were left for Commission decision.

Finally, the last sentence of Section IV (2) of the Settlement Agreement again shows that only a *possibility*, not a *certainty*, of refunds (retroactive application) was provided. It reads:

> Any refunds and/or rate reductions made by reason of this Section IV (2) shall be made as described in the last paragraph of Section IV (1) above. (Petition, page 67)

The reference to "any refunds *and/or* rate reductions" clearly contemplates that refunds *or* future rate reductions *or* both, *or*, as shown by the word "any," *neither*, could be ordered. It shows definitely that refunds do not automatically follow, even from a Commission determination that Natural must start to use "flow through," much less refunds back to 1961.

Thus, the Commission was clearly correct when it held, in Opinion No. 456, relative to the claims of the City of Chicago:

> It is entirely clear to us that the agreement was drafted with the possibility of refunds in mind. Thus it is provided that "In the event it shall be determined" that Natural must use "flow-through", it "shall make such further refunds . . . as shall result from the reduction, if any, in the level of any of the rates contained in its FPC Rate Schedules that may be requested by the Commission . . ." However, it is also clear that the refund is made contingent on the action we might take on the question of liberalized depreciation and there is no language in the settlement which can fairly be interpreted as requiring us to order refunds retroactive to the date the rate increase was put into effect by Natural. (Petition, page 72).

The Commission also correctly held, referring to its earlier decision:

> Opinion No. 367 approving the settlement does not lead to a different result. The relevant language reads as follows (28 FPC at p. 733):
>
> > The second issue is whether Natural should "normalize" its tax expense to eliminate the effect of Int. Rev. Code §167, relating to accelerated depreciation, or should compute its tax expense on the basis of taxes actually paid during the test year (1960). The settlement provides further that pending our decision on these issues, Natural shall collect revenues subject to refund based upon a 52% tax rate and "normalized" depreciation.
>
> This language, like that in the settlement agreement, does not require a refund as of any particular date, although it does contemplate a refund if that should be required by our determination. (Petition, page 73).

The Court of Appeals for the District of Columbia agreed, stating in reference to the contentions of the Petitioners:

> But we do not read the Settlement Agreement as they do. Unlike the issue of rate base reduction previously discussed, the Settlement Agreement clearly does call on the Commission to issue a decision on the issue of Federal tax expense allowances. The parties said in effect: On this issue we cannot work out a settlement, and we leave it to the Commission to decide. The parties may well have assumed that any flow-through decision would be retroactive to 1961, they may have wholly failed to anticipate the possibility that the decision would be prospective, but they did not purport to fetter the Commission's discretion to make its decision prospective. In reaching

its decision on the issues referred to it, the Commission was free to announce and apply the principles it deemed proper under the Natural Gas Act just as if it were disposing of a proceeding in which there had been no settlement. We have already upheld, as in accordance with its discretion under the Natural Gas Act, the Commission's decision, not only to provide for a "flow through" policy, but also to prescribe a 1964 effective date therefor. We do not think the Settlement prohibited application of that approach to Natural. (Petition, page 46).

The above discussion is sufficient to demonstrate that the settlement agreement in question does not require the Commission to apply "flow through" retroactively, to March 1, 1961 or any other date.

B. The Natural Gas Act Does Not Require Application Of A New Policy Retroactively.

It is clear that under the Natural Gas Act, the basic general limitation upon the Commission as to effective dates is that when a natural gas company files a notice of a change in its rates, as Natural did in 1960 to begin the rate case proceeding below, the Commission can make its decision therein effective no *earlier* than the date on which the company began to collect the new changed rates. In the proceedings below, that date was March 1, 1961. The City of Chicago takes the position that such *earliest possible* date is *the date* on which the Commission was *required* to make its "flow through" decision effective. This is a clearly incorrect position, which was rejected by the Commission and the Court of Appeals below. Joint petitioners argue that the Natural Gas Act requires that Natural must make refunds back to March 1, 1961. Their claim is based, it seems, wholly on language

from *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 341 (1956), where this Court held that one of the "*powers*" of the Commission is to make its rate case "order retroactive, by means of the refund procedure, to the date the change became effective" after suspension under Section 4(e) of the Act. It is significant that this Court said "powers," not "duties".

Natural agrees, of course, that Section 4(e) of the Natural Gas Act confers that *power* of retroactivity. But joint petitioners argue that it is not only a *power*, but a mandatory *duty*, in all cases. This is in error and the Court of Appeals so held. (Petition, page 39) First, in *United*, this Court recognized that the use of the permissive word "may" in Section 4(e) of the Natural Gas Act means that retroactive orders, by means of a refund, are permissive, but not mandatory. The statute provides:

> Where increased rates or charges are thus made effective, * * * the Commission *may*, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, * * * and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. (52 Stat. 882; 15 U.S.C. § 717c(e), emphasis added.) (Petition, page 51).

Note that the Commission "*may*" order a bond and "*may*" order refunds, and any refunds are to be of such amounts as may be "ordered by the Commission," because such amounts are to be the "*portion*" (not necessarily all) of "such increased rates or charges by its decision found not justified." The Commission in these proceedings found that "flow through" (and revenues

associated) did not become unjustified until February 3, 1964.

The *United* case itself does not support Chicago's arguments, since it makes no holding about refunds, back to the effective date of rate increases or otherwise. Nor does any other case hold that refunds to such retroactive date are *mandatory* under the Natural Gas Act, and joint petitioners have cited none. The courts in other cases also consistently use the permissive word "may" when ruling with regard to Section 4 of the Natural Gas Act. See e.g., *Wisconsin* v. *F.P.C.*, 303 F.2d 380, 382, 386 (D.C. Cir. 1961), affirmed 373 U.S. 294 (1963); *State Corp. Commission of Kansas* v. *F.P.C.*, 215 F.2d 176, 183 (8th Cir. 1954); and *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, at 229, n. 4 (1965). See particularly *Public Service Commission of New York* v. *F.P.C.*, 329 F.2d 242, 248-250 (1964), cert. denied sub nom., *Prado Oil & Gas Co.* v. *F.P.C.*, 377 U.S. 963 (1964), where the Court of Appeals held that the Commission had power to order refunds, but that this power is not mandatory but rather is to be governed by "the standard of equity."

It is thus clear that the Natural Gas Act, like the 1962 Settlement Agreement, grants *power* to the Commission to order refunds—even to as far back as March 1, 1961—but does *not require* the Commission to do so. The Commission chose to exercise this power by requiring refunds to the retroactive February 3, 1964 date, but not to March 1, 1961. The Commission did this to be consistent with its *Alabama-Tennessee* decision, where the Commission, without objection, did not order any refunds, but rather made its decision prospective from the date of decision and the Commission has made no other decision on this issue retro-

active. Thus, the claims of petitioners, that extreme retroactivity is required, are in error.(*)

CONCLUSION.

For the reasons specified hereinabove—including the fact that the opinion of the Court of Appeals for the District of Columbia, with regard to the points raised in the Petition herein, is clearly correct and that there is no conflict of circuits to be resolved—Natural Gas Pipeline Company of America respectfully requests that the Petition for Writ of Certiorari of joint petitioners herein be denied.

Respectfully submitted,

CHARLES C. McDUGALD
WILLIAM W. BRACKETT
PAUL E. GOLDSTEIN
DONALD W. GLAVES
RAYMOND J. PETERSEN
ROBERT W. BARTLETT
ROSS, HARDIES, O'KEEFE, BABCOCK, McDUGALD & PARSONS
122 South Michigan Avenue
Chicago, Illinois 60603
Attorneys for Respondent
Natural Gas Pipeline Company
of America

January 4, 1968

(*) Petitioners also exhibit inconsistency in their own positions, since the Public Service Commission of Wisconsin, in regulating Wisconsin utilities, negates the "flow through" policy by an additional depreciation allowance. Yet here, they not only urge a complete flow through policy (un-negated), but also ask that it be applied *retroactively*. Similarly, the City of Chicago does not urge the flow through policy for Illinois companies, before the Illinois Commerce Commission, but urges such policy, retroactively, upon Natural.